Supreme Court, U. S.
FILED
OCT 20 1978
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

No. 78-673

WILLIE DEWITT DAWSON,

*Petitioner,*

v.

UNITED STATES OF AMERICA,

*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

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**PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT**

Petitioner, Willie Dewitt Dawson, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals, Fifth Circuit, entered July 14, 1978, affirming his conviction of bank robbery as charged in the indictment, and that on hearing the judgment of conviction be reversed.

## OPINION BELOW

The opinion of the United States Court of Appeals, Fifth Circuit (App. A., infra, p. 1a) has not been reported.

## JURISDICTION

The judgment of the United States Court of Appeals was entered on July 14, 1978. A timely application for rehearing was filed and was overruled on September 21, 1978 (App. C., infra., p. 1c).

This Court has jurisdiction under 28 U.S.C., Paragraph 1257.

## QUESTIONS PRESENTED

1. Whether alternative allegations stated in a single count of an indictment denied petitioner his right to be informed of the nature of the charges against him, as is required by the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States.

2. Do the facts in this case constitute a fatal variance necessitating the allowance of defendant's motion for acquittal at the conclusion of the government's case?

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth and Sixth Amendments to the Constitution of the United States (See Appendix C., infra, p. 1c).

## STATEMENT OF THE CASE

The defendant in this case was charged with bank robbery and was convicted in the United States District Court for the



Northern District of Alabama of the charge and was then sentenced by the Judge for a term of twelve (12) years. The defendant thereupon appealed the case to the United States Court of Appeals, Fifth Circuit, where the Judgment and sentence was affirmed. He petitioned for rehearing and rehearing was denied by the Court of Appeals on September 21, 1978.

The one count indictment for which he was convicted alleged that:

> "That on or about September 26, 1974 within the Northern District of Alabama, the defendant, aided and abetted by Gordon A. Harrell, Jr., Gerald Jenkins and others who are not indicted herein by force and violence and intimidation did take from the person and presence of Jerelene Roberson about $15,569.00 in money belonging to and in the care, custody, control, management and possession of the First National Bank of Russellville, Alabama, Vina Branch, Vina, Alabama, the deposits of which were insured by the Federal Deposit Insurance Corporation. And Gerald Jenkins in committing the aforesaid offense did assault one, Barbara Richardson, and did put in jeopardy the life of the said Barbara Richardson by means of a dangerous weapon, that is to say, a gun."

According to the above allegations the defendant was charged as a principal in the first degree or in other words as the perpetrator of the offense charged in violation of 18 U.S.C.A., Paragraph 2310, which charges robbery of a Federally Insured Bank, aggrevated by assault.

In the allegations of the indictment, Gordon A. Harrell, Jr. and Gerald Jenkins are named as the aiders and abettors of the defendant as principal. All of the evidence in the case show them to be the actual perpetrators of the offense and there was a complete absence of evidence to support the verdict returned by the jury (Tr. 623).

Prior to trial on July 13, 1977 Appellant filed a motion to dismiss the charge against him on the grounds that there was no evidence presented to the Grand Jury upon which the indictment could be based (Cr. 5). The magistrate recommended denial of the motion.

On July 13, 1977 the defendant filed a motion for a Bill of Particulars (Cr. 6), which was denied by the magistrate. On July 14, 1977 appellant filed appeal from the rulings on all of these motions.

The Trial Judge in his charge to the jury limited it to "aiding and abetting" and stated to the jury in his charge that "the defendant here is charged with aiding and abetting the principals with robbery of the Vina Bank" (Tr. 614).

Only two forms of verdict were presented to the jury at the conclusion of the case, one being "we the jury find the defendant not guilty", and the other being, "we the jury find the defendant guilty as charged in the indictment" (Tr. 623). These two forms were prepared and submitted to the jury by the court and the jury was never given the opportunity to find the defendant guilty of aiding and abetting in accordance with the Court's oral charge.

In other words the defendant was found guilty as a principal in the first degree and as the actual perpetrator of the offense when there was no evidence in the case to this effect, the evidence being that if the defendant was guilty of anything he was guilty of aiding and abetting in a very slight degree, was not present at the scene of the bank robbery and according to the evidence was at his home in another county some fifty (50) miles away at the time the bank was robbed.

After the government had rested its case the defense counsel made a motion for acquittal on the grounds of fatal variance based on the evidence or a lack of evidence in that the government had not proved a prima facia case. This



motion was overruled by the Court (Tr. 413).

The conviction of the defendant was appealed to the United States Court of Appeals where the conviction was affirmed on July 14, 1978 (see the opinion of the United States Court of Appeals, App. A., infra). This opinion has not been reported. In this opinion the defendant is referred to as being convicted of aiding and abetting a bank robbery, when in fact the Lower Cout by refusing to submit a form of verdict for aiding and abetting the Court denied the defendant such right to be so convicted.

## REASONS FOR GRANTING THE WRIT

1. The Court of the United States Court of Appeals, Fifth Circuit, departed on the rule that a criminal offense be charged with such certainty as is necessary to apprise the defendant of the nature of the charge against him and to protect the defendant from being put in jeopardy for the same offense in the event future action is taken against him.

The indictment in this case charges the Petitioner with the offense of bank robbery. That is, he is apparently charged as the perpetrator of the actual offense and as a principal in the first degree and the indictment alleges that the Petitioner was aided and abetted by Gordon A. Harrell, Jr. and Gerald Jenkins who were, in fact, the actual perpetrators of the crime. From aught that appears the grand jury certainly knew this, of course, there has to be a perpetrator and proof of the actual offense before there can be a conviction of the offense of aiding and abetting. The name of the perpetrator need not be known or alleged but someone must be alleged as the perpetrator. Thus in this case the Petitioner was alleged to be the perpetrator. In the proof there was a complete absence of

evidence to support the offense charged or the verdict returned by the jury. On the contrary the petitioner was at his home some fifty (50) miles away at the time of the robbery and his participation in the robbery was very slight if at all. It would appear that the members of the grand jury knew who were the actual perpetrators of the offense charged and also knew that the Petitioner was not involved as a perpetrator thus it appears that the defendant is not charged with certainty and does not inform the accused of the nature of the charge against him in violation of his Constitutional Rights. *Hamling v. United States, 418, U.S. 87. Russell v. United States, 369, U.S. 749.*

2. Do the facts in this case constitute a fatal variance necessitating the allowance of defendant's motion for acquittal at the conclusion of the government's case?

To further confuse the defendant and his attorneys as to the nature of the charge the court orally charged the jury on the alternate offense of aiding and abetting. We understand that under the provisions of *18 U.S.C.A., Paragraph 2,* which states in effect that whoever commits an offense against the United States and who aids and abetts its commission is punished as a principal, that a person can be charged as a principal and convicted of aiding and abetting and to the contrary can also be charged with the offense of aiding and abetting and be convicted by the jury as a principal. But in this case for an aider or abettor (as the proof showed the Petitioner to be) to be punishable as a principal the proof must encompass the same elements as would be required to convict any other principal. *United States of America v. Short, 493 Federal Reporter, 2nd Series, page 1170. Hernandez v. United States, 300 Federal 2nd, 114. United States v. Greer, 467 Federal 2nd, 1064.* That is to say before the Petitioner could be convicted for bank robbery



the elements of the offense must be shown to have been committed by the Petitioner beyond a reasonable doubt.

Now as I have stated the Court orally charged the jury of aiding and abetting but then prepared two forms of verdict for the jury, one being "we the jury find the defendant not guilty as charged in the indictment" and the other being "we the jury find the defendant guilty as charged in the indictment". These two charges limited the jury to finding of the Petitioner guilty to only one offense and in fact the verdict could be said to be a directed verdict against allowing the defendant to be found guilty of aiding and abetting. By this time confusion and vagueness were in the minds of the defendant and attorneys to such an extent that they did not know what the defendant was charged with or what was proven. Even the United States Court of Appeals referred to the defendant throughout its opinion as being convicted of aiding and abetting.

After the conclusion of the evidence before the government the Appellant moved for an acquittal on the grounds of a fatal variance between the allegations contained in the indictment and the proof. The motion was overruled by the Court.

The United States Court of Appeals held that because of the defendant's failure to renew Motion for Acquittal after all the evidence in the case had been presented, waived that motion. In reply to such decision of the Court of Appeals attention is called to the case of *Stephen v. United States, 354 Federal 2nd, 999 (Fifth Circuit),* where the Court held that "where ruling on motion for acquittal was reserved until conclusion of the evidence but motion was not renewed and there was no ruling on it the reviewing court must consider state of the evidence when motion was made and test is whether reviewing presented most favorable to the govern-

ment a reasonable minded jury could accept the relevant and admissible evidence as adequate and sufficient to support conclusion of guilt beyond a reasonable doubt." Citing *Riggs v. United States (Fifth Circuit), 280 Federal 2nd, 947.*

## CONCLUSION

The Petition for a writ of Certiorari should be granted.

Respectfully Submitted,

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## APPENDIX A

**UNITED STATES of America,**
**Plaintiff-Appellee,**

**v.**

**Willie Dewitt DAWSON,**
**Defendant-Appellant.**

**No. 78-5027**
**Summary of Calendar.***

United States Court of Appeals,
Fifth Circuit.

July 14, 1978.

Defendant was convicted in United States District Court for the Northern District of Alabama, James Hughes Hancock, J., of aiding and abetting a bank robbery and he appealed. The Court of Appeals, James C. Hill, Circuit Judge, held that: (1) the evidence was sufficient to sustain the conviction; (2) admission of testimony that, sometime before the robbery, the defendant hid another one of the robbers while he was a fugitive from justice, was harmless error; (3) the Government introduced sufficient nonhearsay evidence to establish a prima facie case of conspiracy and to allow admission of evidence under the coconspirator hearsay exception, and (4) the trial court was not required to charge the jury sua sponte that mere knowledge that a crime has been committed is insufficient to support a conviction for aiding and abetting.

Affirmed.

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*Rule 18, 5 Cir.; see *Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York et al.*, 5 Cir. 1970, 431 F.2d 409, Part I.

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*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT*

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## BRIEF FOR THE UNITED STATES IN OPPOSITION

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# In the Supreme Court of the United States

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 576 F. 2d 656.

## JURISDICTION

The judgment of the court of appeals was entered on July 14, 1978. A petition for rehearing was denied on September 21, 1978 (Pet. App. 1b). The petition for a writ of certiorari was filed on October 20, 1978. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTIONS PRESENTED

1. Whether the indictment adequately informed petitioner of the nature of the charge against him.

2. Whether petitioner was entitled to a judgment of acquittal at the conclusion of the government's case.

## STATEMENT

After a jury trial in the United States District Court for the Northern District of Alabama, petitioner was convicted of aiding and abetting a bank robbery, in violation of 18 U.S.C. 2 and 2113(d). He was sentenced to 12 years' imprisonment. The court of appeals affirmed (Pet. App. 1a-7a).

The evidence at trial showed that on September 26, 1974, the Vina Branch of the First National Bank of Russellville was robbed of $15,569 by two masked gunmen (Tr. 81-86). The government's case against petitioner rested primarily on the testimony of the two gunmen involved in the robbery, Gordon Harrell and Gerald Jenkins.[1] Harrell testified that during the evening preceding the bank robbery, petitioner loaned him his rented car to assist in stealing a getaway car (Tr. 139, 143). After stealing the getaway car, Harrell and Jenkins returned to petitioner's home with a duffel bag containing guns and ammunition and remained there throughout the evening to make final preparations for the bank robbery (Tr. 137-151). The robbery plan called for petitioner to monitor the police frequency on a radio receiver in order to alert the robbers to any response by the police (Tr. 142).

Jenkins' testimony corroborated that of Harrell. Jenkins testified that petitioner was informed of the robbery plan, secured the rental car, and pointed out on a map the locations of several banks as targets for the robbery (Tr. 249-250).

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[1]Harrell had previously pleaded guilty to robbing the bank and was sentenced to ten years' imprisonment (Tr. 127-128). Jenkins also pleaded guilty and received a sentence of 12 years' imprisonment (Tr. 245).



At the conclusion of the government's case, petitioner moved for a judgment of acquittal, asserting that a fatal variance existed between the indictment and the government's proof at trial. The district court denied this motion, concluding that the government's evidence was sufficient to support a conviction for aiding and abetting the bank robbery and finding no variance between the evidence and the indictment (Tr. 412-413).

## ARGUMENT

1. Petitioner contends (Pet. 5-6) that the indictment was defective because it failed to give him adequate notice that he was charged as an aider and abettor. He argues that the indictment charged him as a principal, while the proof at trial showed that he was not present at the time of the bank robbery and did not directly participate in it.

But the indictment clearly alleged that petitioner had violated 18 U.S.C. 2 (the aiding and abetting provision) and 18 U.S.C. 2113(d) (the substantive bank robbery provision). Moreover, it is well settled that a defendant indicted as a principal may be convicted on evidence showing that his participation constituted aiding and abetting. See, *e.g.*, *United States* v. *Vines*, 580 F. 2d 850, 853 (5th Cir. 1978); *United States* v. *Leeper*, 413 F. 2d 123, 127 (8th Cir. 1969); *United States* v. *Ramsey*, 374 F. 2d 192, 196 (2d Cir. 1967); see also *United States* v. *Longoria*, 569 F. 2d 422, 424 (5th Cir. 1978). Moreover, petitioner does not suggest that he was misled by the indictment or prejudiced in the preparation of his defense by the asserted variance. The statutory provisions cited in the indictment disclosed the legal basis for the aiding and abetting charge, and the text of the indictment described the details of the bank robbery. In these circumstances, there is no basis for the assertion that the indictment failed to inform petitioner of the nature of the charge against him.

2. Petitioner further contends that he was entitled to a judgment of acquittal because the government's proof varied from the facts alleged in the indictment and because the proof was legally insufficient (Pet. 6-8). Petitioner concedes that "a person can be charged as a principal and convicted of aiding and abetting" (Pet. 6). As noted above, that rule of law is dispositive of his claim of variance. Moreover, the evidence establishing petitioner's guilt was "more than sufficient" (Pet. App. 4a). The testimony of the two principals in the robbery showed that petitioner assisted them by monitoring the police radio frequency, by obtaining a car used in preparation for the robbery, by pointing out potential robbery targets, and by providing accommodations in his home on the night preceding the robbery. Viewed in the light most favorable to the government (*Burks* v. *United States*, No. 76-6528 (June 14, 1978), slip op. 15-16; *Glasser* v. *United States*, 315 U.S. 60, 80 (1942)), the evidence supported petitioner's conviction, and the district court properly denied his motion for a judgment of acquittal.[2]

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[2]The cases cited by petitioner (Pet. 6-7) are not in point. *United States* v. *Short*, 493 F. 2d 1170 (9th Cir. 1974), reversed an aiding and abetting conviction where the district court failed to give the jury an adequate instruction on intent. The court noted that proof of the crime of aiding and abetting " 'must encompass the same elements as would be required to convict any other principal.' " (493 F. 2d at 1172). The district court in the present case clearly instructed the jury that "it is necessary that the accused willfully associate himself in some way with the criminal venture, and willfully participate in it as he would in something he wishes to succeed or bring about or accomplish" (Tr. 609). Moreover, the evidence at trial showed all of the elements of the substantive bank robbery offense that petitioner aided and abetted. The case of *Stephens* v. *United States*, 354 F. 2d 999 (5th Cir. 1965), is also irrelevant. That case dealt with the standard of review to be applied on appeal where the district court fails to act on a motion for acquittal. In the present case, the district court denied petitioner's motion because the evidence of his guilt was sufficient to go to the jury.



## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
*Solicitor General*

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JANUARY 1979